In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-238

MERWIN D. BIRCH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Eastern District of New York, petitioner, a registered pharmacist, was convicted of having disposed of approximately 17,000 capsules of assorted stimulant and depressant drugs, not in the ordinary and authorized course of his business, in violation of 21 U.S.C. (1964 ed. Supp. V) 360a(b) and 331(q)(2).[1] He was sentenced to three years'

[1] Petitioner was tried with Robert Nocerino, who was convicted and sentenced under the provisions of 18 U.S.C. 4208(b).

imprisonment and fined $2,500. The court of appeals affirmed without opinion (Pet. App.).

On December 18, 1970, an audit of petitioner's pharmacy revealed an extreme shortage in the majority of stimulant and depressant drugs handled by the pharmacy between February and December 1970 (Tr. 414-422).[2] Petitioner was thereafter placed under surveillance by agents of the Bureau of Narcotics and Dangerous Drugs. Two shipments of stimulant and depressant drugs ordered for petitioner's pharmacy in January 1971 were marked for identification by government agents prior to delivery to the pharmacy (Tr. 427-430).[3] On January 28, 1971, petitioner took a box from the pharmacy and placed it in his automobile. This box was "almost identical with the one" (Tr. 475) marked by the agents the previous day and had a "Wolman's" assignment slip on top (Tr. 475-477). Petitioner drove to his home where he directed his son to place the box in the garage (Tr. 525-527). The following day petitioner and co-defendant Nocerino were observed transferring what appeared to be drug bottles from petitioner's garage to Nocerino's automobile (Tr. 586-592). When Nocerino drove away from petitioner's garage, he was arrested. On the front seat of the car was a carton containing approxi-

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[2] "Tr." refers to the transcript of the proceedings at trial.

[3] A January 21, 1971 order with Sherry Pharmaceutical Company was marked with the number 605. A January 27, 1971 order with Wolman's Pharm-Cal Corporation was marked with the number 606.

mately 17 bottles of stimulant and depressant drugs. Thirteen of these bottles were from the shipments previously marked by government agents for identification (Tr. 789-792).

1. Petitioner contends (Pet. 5-6) that he did not knowingly consent to the audit of stimulant and depressant drugs on December 18, 1970, since he was not informed that under the administrative warrant authorizing the audit the agents had no power to search for or seize his records if he refused to produce them. However, under 21 U.S.C. (1964 ed. Supp.V) 360a(d)(2) petitioner was required to keep records of his transactions in stimulant and depressant drugs and the agents were authorized at reasonable times to have access to and copy such records and to inventory the stock of such drugs. Moreover, failure to comply with these inspection obligations was itself punishable under 21 U.S.C. (1964 ed. Supp. V) 331(q)(5) and (6). In short, what this Court recently said in *United States* v. *Biswell*, 406 U.S. 311, 314-315, disposes of the claim made here.

> * * * When the officers asked to inspect respondent's locked storeroom, they were merely asserting their statutory right, and respondent was on notice as to their identity and the legal basis for their action. Respondent's submission to *lawful* authority and his decision to step aside and permit the inspection rather than face a criminal prosecution is analogous to a householder's acquiescence in a search pursuant to a warrant when the alternative is a possible criminal prosecution for refusing entry or a forcible

> entry. In neither case does the lawfulness of the search depend on consent; in both, there is lawful authority independent of the will of the householder who might, other things being equal, prefer no search at all. * * * In the context of a regulatory inspection system of business premises that is carefully limited in time, place, and scope, the legality of the search depends not on consent but on the authority of a valid statute. [Footnote omitted.]

Petitioner also contends (Pet. 6) that the agents who conducted the audit on December 18, 1970 violated his Fifth Amendment rights by continuing to question him after he stated he did not wish to waive any of his rights. Petitioner did agree, however, to discuss the operation of the pharmacy with the agents after stating that he would not waive his rights, and he told them that he would consult with his brother, who was an attorney with offices above the pharmacy, if it became necessary to do so during the investigation. Since petitioner was not in custody at the time of the audit, there was no reason for the agents to stop their investigation. *E.g.*, *United States* v. *Jaskiewicz*, 433 F. 2d 415, 417-420 (C.A. 3), certiorari denied, 400 U.S. 1021.

2. Petitioner's contention (Pet. 7-8) that there was no probable cause for his arrest is insubstantial. The agents had observed what appeared to be a transfer of drugs in petitioner's garage and the fact that the bottles found in Nocerino's car were the ones previously marked for identification created the probability that petitioner had effected an illegal

transfer of drugs. Moreover, since no seizure of evidence used at trial accompanied petitioner's arrest, an absence of probable cause would not have been a basis for reversal of his conviction. *Johnson* v. *Louisiana*, 406 U.S. 356, 365.

3. Petitioner contends (Pet. 8-13) that the indictment was based on perjured testimony because the agent who testified before the grand jury did not distinguish his personal observations from those observations made by other agents. Specifically, petitioner argues that in response to certain questions asking, "What did you observe?" the agent responded with a narration of petitioner's actions thereby giving the impression that he had personally observed all the reported events when in fact some of the events had been observed by other agents.

Reversal of petitioner's conviction and dismissal of the indictment, as petitioner requests, is not warranted. There is no affirmative duty to inform the grand jury that it is listening to hearsay. *United States* v. *Payton*, 363 F. 2d 996, 999 (C.A. 2), certiorari denied, 385 U.S. 993. Petitioner does not claim that the government deceived the grand jury as to the facts supporting the indictment nor does he suggest any reason why presentation of the other agents before the grand jury might have affected the return of the indictment. See *United States* v. *Olsen*, 453 F. 2d 612, 615 (C.A. 2); *United States* v. *Leibowitz*, 420 F. 2d 39, 42 (C.A. 2). Furthermore, even excluding the portions of the testimony to which petitioner objects, the grand jury could still

have indicted petitioner on the basis of the other evidence it heard.* See *Coppedge* v. *United States*, 311 F. 2d 128, 131 (C.A. D.C.), certiorari denied, 373 U.S. 946; *Gates* v. *United States*, 122 F. 2d 571, 576 (C.A. 10), certiorari denied, 314 U.S. 698.

4. Contrary to petitioner's claim (Pet. 13-15), it was not error to admit into evidence other records establishing that petitioner had misrepresented his purchases of stimulant and depressant drugs to the agents conducting the audit (Tr. 625-633). Evidence of other illegal activities is admissible when probative of an element of the offense being tried. *Nye and Nissen* v. *United States*, 336 U.S. 613, 618; *United States* v. *Warren*, 453 F. 2d 738, 745 (C.A. 2), certiorari denied, 406 U.S. 944; *Love* v. *United States*, 386 F. 2d 260, 266 (C.A. 8), certiorari denied, 390 U.S. 985. In this case, the evidence of unreported drug purchases was probative of the fact that petitioner was dealing in drugs outside the regular course of business; it also evidenced petitioner's intent to violate the law and showed a course of conduct by which the law was being violated. Since petitioner requested no limiting instruction as to the use of this testimony at trial, he cannot assert on appeal that he was prejudiced by lack of such instructions.

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* The testifying agent was an eye witness to the drug audit on December 18, 1970; to the marking of the drug shipment; and to petitioner's removal of the box from the pharmacy to his home (Tr. 414-431). He identified as hearsay the identification of the box as the one from the shipment (Grand Jury Minutes, p. 6).

5. In the government's bill of particulars, the transfer of the drugs was described as a hand-to-hand delivery. Accordingly, the district court noted that the government was limited to proving that petitioner himself supplied the manpower for the delivery and could not rely on the theory that petitioner merely made the drugs available to be taken by Nocerino (Tr. 922-923). Petitioner contends (Pet. 15-20) that the court failed adequately to define the term "delivery" since the court refused to give his requested instruction that:

> If you find that the Defendant Birch did not deliver the drugs in a hand-to-hand fashion claimed by the Government, you must find him not guilty of the charge in Count I. [Tr. 1053.]

In refusing this instruction the court noted that nothing in the government's case suggested a constructive delivery and thus the instruction was unnecessary (Tr. 1053-1054).

The court did charge that the first element of Count I was, "that Defendant Birch *delivered* the carton of polyethyline bottles, Exhibit 5, to *another person*" (Tr. 1067, emphasis supplied). Moreover, in response to a juror's question the court gave the following supplemental instruction:

> * * * In this case the Government is restricted to establishing that Mr. Birch delivered the depressant and stimulant drugs to Mr. Nocerino before you could convict on Count I. In addition to the other elements, you would have to be satisfied from all of the evidence in the case, be-

yond a reasonable doubt, that Mr. Birch *himself* delivered the depressant and stimulant drugs to Mr. Nocerino *physically*. [Tr. 1094-1095, emphasis supplied.]

These instructions plainly required the jury to find a physical delivery from petitioner to Nocerino. Despite this, petitioner argues that by instructing the jury that they could consider circumstantial evidence of the physical delivery of the drugs the court permitted the jury to find a constructive delivery. This contention confuses the nature of the evidence the jury was permitted to consider with the question of fact they were limited to considering. The instructions required the jury to find an actual physical delivery by petitioner, in order to convict, but the jury was properly told that, in determining whether such a personal delivery had taken place, circumstantial evidence could be considered. See *Holland* v. *United States*, 348 U.S. 121; *United States* v. *Bowles*, 428 F. 2d 592, 597 (C.A. 2), certiorari denied, 400 U.S. 928.

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

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